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Summary record of the 3353rd meeting
Held at the Palais Wilson, Geneva, on Wednesday, 15 March 2017, at 3 p.m.

Chair: Mr. Iwasawa

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The meeting was called to order at 3.05 p.m.

Organizational and other matters, including the adoption of the report of the Working Group on Communications (*continued*)

Draft general comment No. 36 on article 6 of the Covenant (*Right to life*) (CCPR/C/GC/R.36/Rev.2 and Rev.6)

1. **Mr. Shany** (Rapporteur for the general comment) said that the Committee would be considering draft general comment No. 36 on article 6 of the Covenant for the first time since the death of his fellow rapporteur Sir Nigel Rodley. He hoped that the final document would come to be seen as an important part of Sir Nigel's legacy.

2. There were two revised versions of the draft general comment before the Committee: CCPR/C/GC/R.36/Rev.2 and CCPR/C/GC/R.36/Rev.6. The former was the original draft prepared in 2015, of which paragraphs 1 to 35 had been provisionally adopted on first reading. The latter contained new language proposed on the basis of the Committee's discussions at previous sessions. Paragraphs I, II and III would be discussed during the consideration of section V of the draft.

3. **Mr. de Frouville**, referring to the Committee's rules of procedure (CCPR/C/3/Rev.10), said that the summary records of the Committee's meetings should be distributed in provisional form as soon as possible to the members. It was particularly important for members to have the opportunity to verify that the records of meetings devoted to the consideration of draft general comments accurately reflected what had been said.

4. **The Chair** invited Committee members to consider paragraph 35 of the revised draft general comment contained in document CCPR/C/GC/R.36/Rev.6.

Paragraph 35

5. **Mr. Shany** (Rapporteur for the general comment) said that paragraph 35 of document CCPR/C/GC/R.36/Rev.6 was a revised version of paragraph 36 of document CCPR/C/GC/R.36/Rev.2. It dealt with the prohibition against reintroducing the death penalty, creating new capital offences or removing legal conditions that prevented the imposition of the death penalty. It involved a progressive narrowing of the grounds on which the death penalty could be applied with a view, eventually, to abolition.

6. **Mr. Santos Pais** said that, in the interests of clarity, the language in the last sentence should be simplified.

7. **Ms. Brands Kehris** said that it should be made clear, in the last sentence, that removing States must obtain credible and effective assurances that were specific to the individuals being extradited or deported, rather than general assurances that the death penalty was not imposed for a particular offence.

8. **Mr. Heyns**, supported by **Mr. Politi**, said that, in view of the possible reintroduction of the death penalty in a number of States parties, the Committee should emphasize that, like the Covenant, the Second Optional Protocol could not be denounced. He proposed that that idea should be expressed in a new sentence to be inserted between the current first and second sentences.

9. *Paragraph 35 was provisionally adopted, subject to drafting changes.*

10. **The Chair** invited Committee members to consider the draft general comment contained in document CCPR/C/GC/R.36/Rev.2, beginning with paragraph 37.

Paragraph 37

11. **Mr. Shany** (Rapporteur for the general comment) said that the paragraph conveyed the Committee's view that the term "the most serious crimes" in article 6 (2) of the Covenant should be read very restrictively and that crimes not resulting directly and intentionally in death could not conceivably justify the imposition of the death penalty. It also laid down the obligation of States parties to review their criminal laws constantly so as

to ensure that the death penalty was imposed only on the chief perpetrators of a crime. There was a mistake in footnote 161, in that the paragraph cited should, in fact, be paragraph 35 of document A/67/275 of 9 August 2012.

12. **Ms. Kran** said that reference could usefully be made to the report of 29 January 2007 (A/HRC/4/20) drafted by the then Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston. That report also dealt with the term "the most serious crimes" and elucidated two important concepts: intentionality, which, although mentioned in paragraph 37 of the draft general comment, could be further developed; and subjectivity, which was worth introducing in the paragraph.

13. **Ms. Seibert-Fohr** said that, while she agreed with the thrust of the paragraph, the language could be strengthened in places. In the first sentence, she did not see the value in referring to "genocidal killings" — which could arguably be subsumed under "premeditated murder" — as doing so might lower the threshold for imposing the death penalty. In the second sentence, the mention of "sexual offences" added little value, and the phrase beginning with "although serious in nature", could be misconstrued as justifying capital punishment. It would be better, instead, to stress the need to interpret the term "the most serious crimes" objectively. In the last sentence, the Committee should avoid stating that "the death penalty can be imposed". She would prefer the sentence to be couched in negative terms.

14. **Mr. Ben Achour** said that the crimes listed in the second sentence did sometimes manifest "extraordinary high levels of violence" and a "blatant anti-social attitude". One of the main criteria for distinguishing them from the most serious crimes, and the only one that should be alluded to in the second sentence, was that they did not manifest an "utter disregard for human life".

15. **Mr. de Frouville**, referring to the first sentence, said that it was a tautology to state that the most serious crimes were crimes "of extreme gravity". It might be more appropriate to borrow language from the resolution of the Economic and Social Council cited in footnote 151, in which they were described as crimes "with lethal or other extremely grave consequences". It was somewhat paradoxical to say that the term "the most serious crimes" could appertain to genocide, given that international criminal tribunals excluded the death penalty for that crime. He was therefore in favour of deleting the reference to "genocidal killings".

16. Turning to the second sentence, he said that the mention of "sexual offences" was not supported by any reference to the Committee's jurisprudence, and such offences could, in any event, have extremely grave consequences. He agreed that the second part of the sentence could be misinterpreted, and proposed that the Committee should state that "Crimes not resulting directly and intentionally in death cannot generally be qualified as the most serious crimes", before listing examples.

17. The third sentence should be more firmly rooted in the language of criminal law. He proposed that it should be redrafted to read: "In the same vein, limited participation in the commission of even the most serious crimes, such as aiding and abetting through providing the physical means for the commission of murder or not taking the reasonable measures required to prevent and punish it, cannot justify the imposition of the death penalty." With regard to the term "chief perpetrators" in the last sentence, the adjectives "main" or "direct" would be preferable to "chief".

18. **Mr. Heyns** said that, in the past, the Committee had rightly avoided the open-ended term "grave consequences". He agreed that the reference to "crimes of extreme gravity" was unnecessary, and was of the opinion that the term "such as" should be removed from the first sentence as it implied an endless list. He proposed that the sentence should simply read: "The term 'the most serious crimes' must be read restrictively."

19. The concept of intentionality should be incorporated more explicitly. To that end, he proposed the insertion of a new sentence between the current first and second sentences that would read: "Only crimes involving intentional killings can potentially be considered the most serious crimes."

20. He shared the concerns voiced by previous speakers with regard to the second part of the second sentence. His proposal would be to replace everything that followed the phrase "although serious in nature" with the words "do not qualify as the most serious crimes". He agreed with the proposals to delete the reference to "sexual offences" and to express the last sentence in negative terms.

21. **Ms. Brands Kehris** said that she was in favour of redrafting the second and last sentences in negative terms. In the second sentence, that could be achieved by replacing the second part, beginning with the phrase ", although serious in nature," with the phrase "cannot justify the imposition of the death penalty".

22. **Ms. Cleveland** said that, to highlight the key point made in the paragraph, namely that the most serious crimes should satisfy the criterion of intentionality, the first sentence could be redrafted to read: "The term 'the most serious crimes' must be read restrictively and appertain only to crimes that result directly and intentionally in death." While she was comfortable with the last sentence as it stood, she did not object to the proposal to recast it in negative terms.

23. **Mr. Politi** said that perhaps it should be made even clearer that the list of crimes in the second sentence was not intended to be exhaustive. Among those crimes, he wondered whether it would be worth including political offences, given that the American Convention on Human Rights explicitly prohibited capital punishment for such offences.

24. **Mr. Muhumuza** said that genocidal killings were not necessarily targeted and could not be subsumed under premeditated murder. He would prefer to leave the first sentence unchanged. With regard to the second sentence, sexual offences could have irreversible consequences and should be considered separately from the other crimes in the list.

25. **The Chair** said that, in the second sentence, it was not clear whether "blatant anti-social attitude and irreversible consequences" should be regarded as two separate elements and, in any event, the construction "do not manifest … irreversible consequences" did not strike him as proper English. He endorsed the revised wording proposed by Mr. Heyns. In the third sentence, he asked whether the words "a limited degree of" applied to "complicity". If they did not, the Committee would be stating that the death penalty could never be imposed on accomplices, and yet the doctrine of superior or command responsibility under international criminal law held that those who exercised effective control over the person or persons who committed a crime could, in reality, be the main culprits. The meaning of "chief perpetrators" was unclear.

26. **Mr. Shany** (Rapporteur for the general comment) said that he agreed with the proposals to shorten the first sentence and to emphasize the criterion of intentionality. While he appreciated Mr. Muhumuza's point about genocidal killings, he agreed with other members that the reference to them could be deleted.

27. The fact that sexual offences were included in the list of crimes in the second sentence did not imply that they were not very serious. He felt strongly that the reference to sexual offences should be retained, all the more so as some States, such as India, treated aggravated rape as a capital offence.

28. The four criteria that followed the words "do not manifest" should be interpreted as cumulative. He would endeavour to find new language for the second part of the second sentence to accommodate the concerns expressed by some members, but care should be taken to ensure that the sentence did not become an ipse dixit. The purpose of the general comment was, after all, not only to elucidate article 6 of the Covenant but also to persuade States parties that the Committee's interpretation of the article was sound.

29. In the third sentence, the words "a limited degree of" did apply to "complicity", although that could be made clearer. In the last sentence, the reference to "chief perpetrators" in the plural was deliberate. He did not object to the proposal to redraft the sentence in negative terms.

30. He agreed that the concept of subjectivity should be addressed. He was aware of the report by Philip Alston and would review it again to glean any additional elements of interest. The issue of political crimes would also require further consideration. He would

produce a revised version of the paragraph for consideration later in the session on the basis of the comments made by members.

31. *It was so decided.*

Paragraph 38

32. **Mr. Shany** (Rapporteur for the general comment) said that the paragraph conveyed the Committee's view that the death penalty should never be applied as a sanction against conduct whose very criminalization violated the Covenant.

33. **Mr. Ben Achour** said that he agreed that the types of conduct listed in the first sentence should be dealt with separately from the crimes mentioned in the second sentence of the previous paragraph. He did not think, however, that establishing opposition groups, which had been punishable in the past in one State party under circumstances that had long since changed, was comparable to homosexuality and apostasy, which were repeatedly punished in a number of States parties.

34. **Mr. Fathalla** said that he was not in favour of providing a list that was not exhaustive, but that if one was included, the acts of "establishing opposition groups" and "insulting a head of State" could both be covered by "political crimes".

35. **Mr. Koita**, referring to the French version, said that the term "*groupes d'opposition*" was imprecise and should be changed. Similarly, it would be more appropriate, from a legal perspective, to speak of "*offense au chef de l'État*" rather than "*le fait d'insulter un chef d'État*".

36. **Ms. Cleveland**, supported by **Mr. Politi**, said that the term "political crimes" was too vague to cover "insulting a head of State", an act whose criminalization was an issue frequently faced by the Committee.

37. **Ms. Kran**, supported by **Mr. Heyns** and **Mr. Politi**, said that, unless the Committee was in a position to specify what constituted a serious violation of the Covenant, the adjective "serious" should be deleted.

38. **Mr. Heyns** said that, in the second sentence, it would be more accurate to replace the words "article 2, paragraph 2 of the Covenant" with the words "the other provisions of the Covenant".

39. **Mr. Politi** said that, at the end of the first sentence, the Committee could perhaps refer to "establishing opposition groups, insulting a head of State or other political offences".

40. **Mr. Shany** (Rapporteur for the general comment), noting concerns over the use of the term "opposition groups", said that one solution might be to refer to "opposition parties". He was reluctant to use the term "political crimes", which was overly broad, in that it encompassed conduct whose criminalization did not necessarily violate the Covenant. He had no objection, on the other hand, to replacing the word "insulting" with the word "offending".

41. Turning to the second sentence, he said that the reference to article 2 (2) of the Covenant was useful and should therefore be retained. The words "as well as other provisions of the Covenant" could, however, be inserted at the very end of the sentence. He was willing to delete the adjective "serious", although the Committee did sometimes refer to a "serious" breach of the Covenant when it wished to underscore the extent of its disappointment or concern.

42. **Ms. Brands Kehris** said that organized dissent took many different forms, not only the establishment of political parties. While the words "establishing opposition groups" were perhaps not ideal, the issue that they addressed was important and should not be ignored. The Committee might instead refer to "expressing or organizing political dissent".

43. **Mr. Shany** (Rapporteur for the general comment) said that the function of general comments was to codify not only the Committee's views but also its practice. They might therefore include rather narrow formulations that nevertheless reflected that practice. The

list was intended to be illustrative, not comprehensive, and was based on specific cases that had been discussed by the Committee.

44. **Ms. Cleveland** said that she would prefer to retain the word "parties". The list was not exhaustive and allowed for other instances of criminalization.

45. **Mr. Fathalla** said that the expression "political groups" was far more commonly used than "political parties".

46. **Mr. Heyns** said that it was important to stick to specific cases; if "parties" was the word used in the reference given in footnote 164, that language should be retained.

47. **Ms. Pazartzis** said that she appreciated Mr. Heyns's point, but if the purpose of the general comment was to codify the Committee's practice it was difficult to see the usefulness in referring to a single case such as Libya, mentioned in footnote 164. If the point was retained then she would prefer to use the word "groups".

48. **Mr. de Frouville** said that the exercise was partly one of codification and partly one of developing international human rights law. On a point of human rights law where there was already a history of input from various bodies, the Committee could take the opportunity to develop its own thinking even if there were no precedents in its own jurisprudence.

49. After further discussion in which **Ms. Seibert-Fohr**, **Ms. Pazartzis**, **Mr. Koita** and **Mr. Ben Achour** took part, **Mr. Shany** (Rapporteur for the general comment) proposed placing the words "organized political opposition groups" between square brackets, to be reviewed at the second reading. In addition, the word "serious" would be deleted; the word "insulting" would be replaced with the word "offending"; and the reference to article 2 (2) would be maintained and supplemented with the words "as well as other provisions".

The meeting was suspended at 4.35 p.m. and resumed at 4.50 p.m.

50. **Mr. Fathalla** said that it was important to take account of precedents, but equally important to cover present and potential future cases. A single case in which the death penalty had been applied to the establishment of opposition groups or two cases of insulting a head of State could not be considered precedents.

51. **Mr. Shany** (Rapporteur for the general comment) said that he agreed that a single case provided a weak precedent. It did however constitute an example of a situation on which the Committee had deliberated and reached a conclusion. It might not yet be settled case law, but it could nevertheless serve in developing the interpretation of the law. It would be different if the Committee felt uncomfortable with the content of a single precedent, but if it felt confident that lese-majesty, for example, should not be criminalized, then the point should be retained. A general comment based only on multiple cases would be rather thin.

52. **Mr. Santos Pais** said that another reason for drafting general comments was to provide guidance to States parties in applying the Covenant. With the criminalization of dissent, criticism of heads of State was becoming less common. The reference to insulting heads of State should therefore be retained. He would also favour retaining the reference to the criminalization of opposition, which reflected a situation in which dissent was taken so seriously by the State party that it applied the death penalty.

53. **Ms. Cleveland** said that criminalization of the insulting of heads of State was on the rise, making it all the more important to address the issue in the general comment.

54. *Paragraph 38, as amended, was provisionally adopted.*

Paragraph 39

55. **Mr. Shany** (Rapporteur for the general comment) said that paragraph 39 conveyed the Committee's position that the death penalty should never be mandatory; individual circumstances must be duly taken into account by the court at the trial stage and not left until the pardon or commutation stage.

56. **Ms. Seibert-Fohr** said that she agreed with the thrust of the paragraph. The mention of aggravating circumstances seemed out of place, however. The Committee would surely wish to emphasize attenuating circumstances.

57. **Mr. Santos Pais** said that judges had to take account of all elements. He proposed replacing, in the first sentence, the words "including its specific aggravating or attenuating elements" with the words "either aggravating or attenuating elements".

58. **Mr. Heyns** proposed deleting, in the second sentence, the words "on whether or not to designate the offence as a crime of the most serious nature", which were superfluous to the point being made.

59. **Mr. Politi** said that there were two aspects to consider in the second sentence. Generally, if the crime was deemed "most serious", the death penalty could potentially apply; the second aspect related to the circumstances of the particular case.

60. **Mr. Heyns** said that the second component surely subsumed the first.

61. **Mr. Koita** requested clarification of the last sentence.

62. **Mr. Shany** (Rapporteur for the general comment) said that while the phrase "specific aggravating or attenuating elements" was quite neutral as it stood, he was not opposed to deleting the words "aggravating or". In any case the phrase was introduced by "including", which allowed for other circumstances. The last sentence referred to the fact that, where the death penalty was mandatory, the court had no discretion; discretion might then be exercised by some other entity that would take the particular circumstances into account. The Committee considered that such discretion ought to be exercised by the judicial authorities. In reply to Mr. Heyns's point regarding the second sentence, he said that, for example, where a life had been taken in the course of a robbery, then a determination would have to be made as to whether it would constitute a capital offence. Whether the particular circumstances of the offence then warranted the death penalty was a separate issue.

63. *Paragraph 39, as amended, was provisionally adopted.*

Paragraph 40

64. **Mr. Shany** (Rapporteur for the general comment) said that article 6 of the Covenant had been drafted only two years after the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide in 1948, and from a re-reading of the *travaux préparatoires* it appeared that paragraph 3 had been included because States had wished to make quite sure that a legally authorized death penalty could not be used to further a campaign of genocide.

65. **Mr. de Frouville**, supported by **Ms. Pazartzis**, said that he did not consider the paragraph to be necessary. It was obvious that States parties could not invoke the Covenant in pursuit of a campaign of genocide. On the other hand, it might be useful to include similar language in section I of the comment, thereby creating a substantive link between the Covenant and the Convention on the Prevention and Punishment of the Crime of Genocide. It would not do to ignore article 6 (3) entirely but it could be addressed more constructively.

66. **Mr. Santos Pais**, supported by **Ms. Cleveland**, said that he favoured retaining the paragraph. Incidents of genocide had taken place in Europe not so long ago and would probably recur. If the general comment was to be of use in the future it would make sense for it to address genocide and, in that connection, the issue of the death penalty being incorporated into domestic law as a pretext to target members of particular groups.

67. **Mr. Shany** (Rapporteur for the general comment) proposed retaining the paragraph as drafted at least until the second reading. In the context of a general comment on the right to life, it would be strange to ignore a provision of the Covenant relating to genocide.

68. *Paragraph 40 was provisionally adopted.*

Paragraph 41

69. **Mr. Shany** (Rapporteur for the general comment) said that paragraph 41, on article 6 (2), was not about the introduction of the death penalty in a State that had not applied it theretofore, although there was some overlap with paragraph 36. Rather it dealt with the introduction of the death penalty or the creation of new capital offences after a crime had been committed and thus highlighted the interplay between article 15, on non-retroactivity of legislation, and article 6. It also recalled the retroactive nature of any legislative amendments that replaced the death penalty with a prison sentence.

70. **Ms. Seibert-Fohr** said that the third sentence could convey a contradictory message in respect of paragraph 36, in which the Committee had stated that the death penalty must never be reintroduced. Obviously, if it could not be reintroduced in the first place then it could not be applied retroactively.

71. She agreed with the thrust of the fifth sentence but considered that article 15 applied only in the case of individuals who had as yet only been charged with a capital offence; in the case of those who had already been convicted and who must benefit from any subsequent abolition of the death penalty, it was article 6 itself that applied. Recalling that article 6 (2) read "In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime ...", she said that, if the word "imposed" was taken to refer not only to the sentence but also to the execution of the sentence, it was clear that it was article 6 (2) that covered such cases. She proposed ending the sentence after the phrase "individuals charged with or convicted of a capital offence". The last sentence was superfluous and should be deleted.

72. **Mr. Ben Achour** said that the paragraph was too dense. He proposed splitting it into two or three shorter paragraphs.

73. **Mr. Heyns** said that the last sentence ought not to refer to "the legislature", as it could be the Constitutional Court or another branch of government that deemed the death penalty to be no longer appropriate. He proposed replacing the last part of that sentence, beginning with the words "after the legislature has deemed", with the words "after the penalty has been abolished".

74. **Ms. Cleveland** proposed replacing the Latin terms with English ones and placing the Latin expressions afterwards in parentheses. The expression "unclearly defined" in the fourth sentence should read "vaguely defined". Referring to footnote 172, she proposed citing, in addition to the European Court of Human Rights judgment, the Committee's own jurisprudence in communication No. 2244/2013, *Dassum v. Ecuador*, which also dealt with the issue of reasonable foreseeability.

75. She proposed that, in the fifth sentence, the phrase "to benefit offenders of lighter penalties" should be amended to read "to grant offenders the benefit of lighter penalties". She understood the last sentence to be intended as an explanation of the Committee's reasoning. To improve readability she proposed rewording it along the lines of: "The need to retroactively apply legislation abolishing the death penalty or certain capital offences also derives from the fact that the necessity of imposing the death penalty cannot be justified once this penalty has been deemed no longer appropriate".

76. **Mr. de Frouville** said that he agreed with Ms. Seibert-Fohr's comments regarding the third sentence and proposed conflating the third and fourth sentences to read "As a result the imposition of the death penalty must not be based on unclearly defined criminal provisions", and deleting the remainder of the fourth sentence. He proposed deleting the last part of the fifth sentence, starting from the phrase "in accordance with the principle". He also proposed deleting the entire last sentence on the grounds that the Committee should avoid attempting to justify legal reasoning with reference to moral or philosophical considerations.

77. **Mr. Politi** said that he agreed that the third sentence could be deleted. The principle expressed in the fifth sentence, namely that of offenders benefiting from the imposition of lighter penalties, should be retained, albeit without the reference to article 15. He also agreed that the last sentence should be deleted.

78. **The Chair** said that he too supported the deletion of the last sentence. He agreed with Ms. Seibert-Fohr's comments concerning the fifth sentence, and further suggested that the words "at the same time" should be replaced with the words "on the other hand", since the emphasis was shifting from non-retroactivity to retroactivity. As to the reference in footnote 172, he usually took the view that the Committee ought not to rely on regional jurisprudence in its general comments, so in the third sentence of the paragraph he suggested deleting the words "and which would not be reasonably foreseen", unless the reference to the *Dassum v. Ecuador* case proved a suitable replacement for the European Court of Human Rights citation.

79. **Ms. Cleveland** said that the *Dassum v. Ecuador* case did not address the issue clearly and her inclination would be to supplement the European Court of Human Rights citation rather than replace it.

80. **Mr. Shany** (Rapporteur for the general comment) said that Mr. Ben Achour's concern about the denseness of the paragraph would probably be met if the proposals for removing language were adopted. He agreed with the suggestion to replace the Latin phrases with English ones and to replace the word "unclearly" with the word "vaguely". As to footnote 172, he would review the *Dassum v. Ecuador* case to determine if the reference to it could stand alone. If not he would recommend retaining the European Court of Human Rights reference, which was an important source on the issue of legal certainty.

81. He was not strongly opposed to the proposal to delete the third sentence. However, he recalled that anyone invoking the general comment was not necessarily going to make use of the document as a whole and thus, although it would not develop the content of paragraph 36, it would probably serve the purpose of the general comment to underscore the obligation not to introduce the death penalty; he would therefore be inclined to retain the point. If the Committee preferred, the sentence could be amended to read "As a result, for this reason too, the death penalty can never be reintroduced".

82. He could agree to the deletion of the last sentence, which appeared to be the consensus among Committee members. He would, however, be reluctant to delete the reference to article 15. If the legal position was covered by a specific provision of the Covenant then it would be wise to refer to that provision. He would be reluctant to do away with a reference to an important source that the Committee might wish to rely on in application of the *lex mitior* principle. He accepted Ms. Seibert-Fohr's point that article 15 supported only part of the argument being made, but that could be addressed by adjusting the language. He proposed rewording the reference along the lines of "which finds partial expression in the third sentence of article 15 (1)". That would convey the idea that the principle was one that extended beyond the scope of article 15.

83. **Ms. Seibert-Fohr** said that, with regard to the reference to article 15, two different scenarios needed to be distinguished. Where someone had been charged with a capital offence, if, while proceedings were ongoing, it was decided that that offence no longer warranted the death penalty, then she would fully agree that article 15 and the *lex mitior* principle applied. However, she was doubtful that *lex mitior* could benefit those who had already been sentenced. If that were the case, then, leaving aside the question of the death penalty, all those who had been prosecuted and sentenced for a given offence on the basis of the law that was applicable not only at the time of the offence but also at the time of the sentence, and were serving that sentence, would be entitled to have the sentence changed. That was in fact what applied in the event of abolition of the death penalty, and naturally everyone should benefit from commutation, but it followed from article 6, not article 15, and was not an application of *lex mitior*. Thus either the reference to article 15 and *lex mitior* should be linked to accused persons or it should be removed.

84. **Mr. Santos Pais** said that another possibility was a case where there had been a conviction in the lower court and an appeal was still under way, so that the judgment was not final. It was indeed important to differentiate between the various situations; article 15 could not apply where final judgment had been handed down (*res judicata*).

85. **Mr. Shany** (Rapporteur for the general comment) said that, if he understood correctly, Ms. Seibert-Fohr's contention was that abolition of the death penalty should indeed apply retroactively but not in application of *lex mitior* or in application of article 15

or on the grounds given in the last sentence of the paragraph, but simply on the basis of article 6 itself. Yet article 6 did not address the point.

86. The Committee needed to be able to justify its legal position regarding the retroactive application of the abolition of the death penalty to all individuals charged or convicted of capital crime. Its position was typically either in accordance with — as opposed to derived directly from — the principle of *lex mitior*; or in accordance with — or, as he had conceded, partly covered by — article 15. The last sentence was intended to cover any scenarios not specifically covered by the first two. Although, as had been stated, the Committee ought not to resort too often to moral or philosophical justifications, having heard the various contributions it was his view that the last sentence should be retained as it underpinned the entire structure of the argument.

87. **Mr. de Frouville** said that article 6 (2) might provide the language needed in paragraph 41. It referred to a death sentence imposed "in accordance with the law in force at the time of the commission of the crime" and to the fact that the penalty could "only be carried out pursuant to a final judgment rendered by a competent court". There were three different categories in that context: those who had been charged, those who had been convicted in a lower court and those on whom final sentence had been passed. In his view the possibility of applying a change of penalty to sentences already handed down could be read, albeit between the lines, into article 6 (2).

88. **Mr. Shany** (Rapporteur for the general comment) said that the text of article 6 (2) did not appear particularly helpful, since it gave the time of the commission of the crime as the critical moment in relation to the imposition of the death penalty. The Committee should be able to explain its reasoning in interpreting the Covenant. He would produce a revised version of the paragraph for consideration later in the session on the basis of the comments made by members.

89. *It was so decided.*

Paragraph 42

90. **Mr. Shany** (Rapporteur for the general comment) said that paragraph 42 dealt with the method of application of the death penalty, which must be consistent with article 7 of the Covenant. It gave examples of situations where the application of the death penalty might violate article 7.

91. **Mr. Heyns** proposed deleting the first two sentences, which appeared to suggest that it was possible to implement the death penalty in conformity with article 7. There was much dispute around the notion that there might be ways of executing people that did not amount to torture or ill-treatment, one view being that the death penalty was a violation of article 7 however it was executed, and the Committee ought perhaps not to take a position on that. There was not enough jurisprudence to allow it to conclude that the death penalty could never be executed in a humane manner, but on the other hand it should avoid saying that a person could be hanged, for example, in a manner that was in conformity with article 7. He suggested therefore that the paragraph should simply list those forms of execution that had been found to be in violation of article 7. He proposed simplifying the fifth sentence by replacing the phrase "the subsequent carrying out of the death penalty" with the words "the execution".

92. **Mr. de Frouville** said that he agreed with the proposal made by Mr. Heyns. The list of methods of execution might be open to misinterpretation and, moreover, appeared to contradict paragraph 53 of the draft, which referred to the possibility that at some future time it might be concluded that the death penalty per se ran contrary to article 7 under all circumstances. In the last sentence of the paragraph he proposed deleting the word "especially". The violation of articles 6 and 7 effectively derived from a combination of two elements: on the one hand, the delay in implementation resulting from the need to exhaust all legal remedies and, on the other hand, the conditions of detention. Lastly, he proposed adding solitary confinement to the circumstances that might lead to a violation of article 7.

The meeting rose at 6 p.m.